No. 20390

In the

United States Court of Appeals

For the Ninth Circuit

FEB 10 1967

A. BATES BUTLER, AS TRUSTEE of Construction Materials Co.,
Appellant,

vs.

CITY OF TUCSON, et al.,
Appellees.

THE BANK OF TUCSON,
Appellant,

vs.

PACIFIC NATIONAL INSURANCE COMPANY, CITY OF TUCSON, MARTIN CONSTRUCTION COMPANY and A. BATES BUTLER,
Appellees.

MARTIN CONSTRUCTION CO., and PACIFIC NATIONAL INSURANCE CO.,
Appellants,

vs.

BANK OF TUCSON, et al.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

Reply Brief of Appellant A. Bates Butler, as Trustee of Construction Materials Co.

Answer to Cross Appeal of Appellees, Pacific National Insurance Company and Martin Construction Company

Answer to Cross Appeal of Appellee, Bank of Tucson

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

INTRODUCTION

For the sake of clarity, A. Bates Butler, Trustee in Bankruptcy of Construction Materials Company, Bankrupt, Appellant, shall hereinafter be referred to as "Trustee." Construction Materials Company, bankrupt, will hereinafter be referred to as "Bankrupt." The City of Tucson, Appellee, will hereinafter be referred to as "City." The Bank of Tucson, Appellee, shall hereinafter be referred to as "Bank," Martin Construction Company, Appellee, shall hereinafter be referred to as "Martin," and Pacific National Insurance Company, Appellee, shall hereinafter be referred to as "Pacific."

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ARGUMENT

A case directly on point and construing a situation almost identical to the present case at Bar is the case of *Adamson v. Paonessa* (1919) 180 Cal. 157, 179 P. 880 with a Company known as National Surety Company taking the identical position of Pacific in this case.

Adamson v. Paonessa deals with the problem of an assertion of an equitable lien arising out of Bonds pursuant to the California Improvement Act of 1911.

The present Arizona Code ARS 1956 indicates that this the California Improvement Act was the source of Arizona's

present day act that gave rise to the controversy concerning the Municipal Bonds in question.

Thus the case of *Adamson v. Paonessa* takes on added weight concerning the question of an equitable assignment.

The *Adamson v. Paonessa* case is so similar to the present fact situation that in discussing the case Appellant will not even paraphrase but will quote verbatim:

> The first ground advanced is that, by virtue of its payments as surety for Paonessa of the claims against him for materials and labor furnished, it acquired by subrogation an equitable lien upon any moneys or bonds due under the contract in payment for the work superior to any assignment or other disposition which Paonessa might have made. There is no doubt but that the payment by the surety company pursuant to its obligations as surety would work a subrogation in its favor of any rights which the claimants had whose claims were paid. It is equally clear that the subrogation would give no further rights than this. What rights, therefore, had these materialmen and laborers against the moneys or bonds that were due under the contract on the completion of the work? If they had none, and if their rights were limited to a personal recovery against Paonessa and to a recovery upon the bond given by the surety company, it is clear that there was nothing upon which the subrogation could work. Such we believe to be the case under the Improvement Act of 1911, under which the work was done.
>
> The only provision in the act of 1911 providing security to materialmen and laborers for the payment of their claims is section 19. This section requires that every contractor to whom a contract is awarded under the act must file with the superintendent of streets a good and sufficient bond inuring to the benefit of any and all persons performing labor on or furnishing materials used in the work or improvement. There is no provision which gives such claimants any right or

lien, equitable or otherwise upon money or bonds coming to the contractor. In particular, there is no provision in the act authorizing or permitting the retention by the municipality, or by the owners whose lands are assessed, of anything which may be due the contractor in order to pay the claims of materialmen or laborers, or permitting the deduction of the amount of such claims from anything that may be due the contractor. We are constrained to believe that it was the intention of the statute that parties furnishing materials or labor to a contractor doing work under a contract let in accordance with this act must look solely to the contractor's personal responsibility and to the bond which the statute requires him to furnish.

This construction of the statute is strengthened by a consideration of the method of payment contemplated by it. It contemplates that the contractor be paid directly by the property owners whose property is assessed for that purpose, each paying for himself his own assessment, and this whether the payment be in money or in bonds. It is true that any property owner may discharge the assessment on his property by making payment to the city treasurer, but the act clearly contemplates that the city treasurer in such case is merely acting as a convenient means or conduit whereby the property owner may make payment to the contractor. Essentially the payment is one by each property owner directly to the contractor.

It is manifest that under such circumstances there is no single fund out of which the contractor is to be paid and it is likewise clear that, in view of the fact that payment may be made to the contractor without the interposition of the city treasurer or any other city official or common conduit of payment, any right to have moneys or bonds coming to a contractor retained in order to meet claims against the contractor would be quite impracticable. The act provides no machinery by which the amount to be retained from the payment

by the property owner can be ascertained or he be notified of the amount he is to retain.

The result so arrived at is not affected by the provisions of section 1184 of the Code of Civil Procedure. That section, as amended in 1911, provides for the giving of notice by any person who has performed labor or furnished materials under a contract, and then continues as follows:

"Upon such notice being given it shall be lawful for the owner to withhold, and in case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claims and any lien that may be filed therefor including the reasonable cost of any litigation thereunder."

This provision is clearly applicable only to cases where the contractor is to be paid either by the owner of the property upon which the work is done, or by the person, public or private, by whom the contract was made. It cannot be applied where payment is not to be made in that manner, but is to be made by a number of different persons not parties to the contract, each of whom pays independently his separate share of the amount due.

Right here also lies the difference between the present case and the line of authorities cited by appellant's counsel, beginning with Prairie State Nat. Bank v. United States, 164 U.S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. In those decisions the facts are essentially the same as in this, with the exception that either by statute or by the contract itself a fund was in effect reserved for the benefit of materialmen and laborers whom the contractor might fail to pay. In other words, the materialmen and laborers had a right as against a certain fund in addition to any recovery against the contractor or his surety. Under such circumstances, if the surety

paid their claims, he would be subrogated to their rights against such fund. Such, however, is not the case here, as there is no fund against which the materialmen and laborers have a right.

Thus it appears that we have here an identical fact situation construing the identical claim (equitable assignment) under the identical statute but in a different state though within this same circuit.

Wherefore it is respectfully requested that the judgment of the District Court be reversed and that title be held to have bested in the Trustee free and clear of any equitable lien of Martin or Pacific.

In the

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For the Ninth Circuit

MARTIN CONSTRUCTION CO., and PACIFIC NATIONAL INSURANCE CO.,	*Appellants,*
vs.	
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STATEMENT OF THE CASE

In plain and simple terms what has happened is that a Surety Company has paid a subcontractor on a claim for labor and materials.

ARGUMENT

It is Trustee's position that payment by a surety to subcontractor for a claim filed by the subcontractor gives the surety just whatever rights the subcontractor had against the City (or to the retained funds) and no greater rights. This is the law and has been settled in the case of *Adamson v. Paonessa*, (1919) 180 Cal. 157, 179 Pac. 880. This case is

almost exactly similar to the case at hand. Paonessa had entered into a contract to do certain work for the City of Colton. He filed a surety bond (for the payment of claims for materials, labor, etc.)National Surety Company was the surety on the bond. Paonessa had made a written application for the bond (in the case at hand we have no such written application.) A portion of the application reads as follows:

> "All payments specified in the above-mentioned contract (i.e. the contract with the City of Colton for doing the work) to be withheld by the obligee until the completion of the work shall, as soon as the work is completed, be paid to the Company (the surety company) and this covenant shall operate as an assignment thereof, and the residue, if any, after reimbursing the company as aforesaid, be paid to the applicant after all liability of the Company has ceased to exist under said bond."

No notice of this assignment (if it was an assignment) was given to the City. (In our case no notice of the indemnity agreement was given to the City.) While the work was in progress another defendant, Lloyd, advanced funds to Paonessa and took a written assignment of all his rights under the contract and filed the assignment with the City Clerk. When the job was completed the City recognized the assignment to Lloyd. The Surety then demanded the money (warrants) on the ground that they held an assignment by virtue of the bond application and the fact that they were called upon to pay approximately $10,000.00 for material and labor furnished which Paonessa had not paid. Judgment was entered against the Surety Company which then appealed and advanced two grounds for the appeal. Both of the grounds advanced are the grounds that Pacific in this case suggests as the basis for its claim:

1. That by virtue of its payment as surety for Paonessa of claims against Paonessa for labor and material furnished, it acquired by subrogation an equitable lien upon any monies due under the contract superior to an assignment or other disposition that Paonessa might have made, and
2. That by virtue of the application for the bond, he, Paonessa, had assigned to the surety his right to the money (warrants) to become due him under the contract with the City and this assignment being prior in time to the assignment to Lloyd, is prior in right.

In answer to the first point the court acknowledged that the surety by virtue of paying the claim pursuant to its obligation as surety obtained a subrogation in its favor of any rights which the claimant had whose claims were paid. But it was also true that the subrogation would give no greater rights than this. The Court then attempted to establish what rights these claimants would have had and decided that the claimants would have had no rights to the funds (warrants). The court then differentiated between that case and the *Prairie State National Bank v. U.S.*, (1846) 164 U.S. 227; 41 L.ed. 412, 17 S. Ct. 142 (relied upon by Pacific in this case to substantiate its position). In explaining the difference the court said: "In those decisions (Prairie State National Bank and others) the facts are essentially the same as in this, with the exception that either by statute or by the contract itself a fund was in effect reserved for the benefit of materialmen and laborers whom the contractor might fail to pay." (In our case neither the contract nor any statute made such a provision). "In other words, the materialmen and laborers had a right as against a certain fund in addition to any recovery against the contractor or his surety. Under such circumstances, if

the surety paid their claims, he would be subrogated to their rights against such fund. Such, however, is not the case here, as there is no fund against which the materialmen and laborers have a right."

Thus we see no statute providing for payment, no contract containing such a payment provision, and no fund out of which to make such payment. The claimant is limited to his right against the surety on the bond and the surety is subrogated to no greater right than the claimant whom he had paid.

The second point on appeal pertained to the notice of assignment given by the surety on the City. They had not given the bond and the court held the City was not bound by it since they did have notice of the assignment to Lloyd. In our case there was no written application for the bond, no assignment to Pacific. Pacific is attempting to become a third party beneficiary of at most an equitable assignment.

The case of *Hochevar v. Maryland Casualty Co.,* (CCA 6, 1940) 114 F. 2d 948 is not in point and is not authority for holding in favor of the Defendant. In that case a contractor entered into a contract with Belmont County, State of Ohio to do construction work on a highway. He did not finish a 100′ strip of the highway which fact the County was aware of. Notwithstanding this knowledge the County paid all sums due to the contractor less a statutory withholding amount. The contract had expressly provided for the county not to make the payment until final completion. In differentiating this case from cases more similar to the one we are involved with, the court said:

> "The decision of the Ohio Court of Appeals in Village of Beachwood v. Ohio Casualty Insurance Company, 47 Ohio App. 212, 191 N.E. 797, is not applicable inasmuch as the Village was not obligated by the contract, as was the County here, to retain the percentages until materialmen and laborers were paid, and, because of the

> dissimilar facts involved, no importance should here be attached to statements therein that the rights of the surety can rise no higher than those of materialmen or laborers; nor could we extend the rule of that case to this without disregarding the implications of State v. Schlessinger, 114 Ohio St. 323, 151 N.E. 177, decided by the Supreme Court of Ohio, whose declarations alone are binding upon us in this case. . . . The Ohio cases refusing to impose quasi-contractural duties upon counties are not applicable, because the counties duty arises from express provisions in its contract."

The case of *Pearlman v. Reliance Bus Co.*, (1962) 371 U.S. 132, 9 L. ed. 2d 190, 83 S. Ct. 232, relied upon by Pacific as authority for its position is not applicable to the factual situation present here. The *Pearlman* case relied upon the case of *Prairie State National Bank v. United States*, (1896) 164 U.S. 227, 41 L. ed. 412, 17 S. Ct. 142, for authority in its holdings. The *Paonessa* case (supra) completely differentiated the *Prairie State* case fact situation from the factual situation present in our case and clearly established that neither it (the *Prairie* case) or the *Pearlman* case is of any significance in the case at hand. In both the *Prairie State* case and the *Pearlman* case there was an express contract provision between the subcontractor and the surety providing for an assignment of "any and all percentages of the contract price retained on account of said contract, and any and all sums that may be due under said contract at the time of such . . . forfeiture or breach, or that thereafter may become due. . . ." There is no such assignment present in the case at hand.

CONCLUSION

It is respectfully submitted that the judgment of the District Court be reversed and that title be held to have vested in the Trustee free and clear of any claim of Martin or Pacific.

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Answer to Cross Appeal of Appellee, Bank of Tucson

This portion of the Brief will relate to answering the Cross Appeal of the Bank of Tucson relating to the question of whether or not they are entitled to attorneys' fees in the sum of 10%, an amount specified in a promissory note.

FACTS OF THE CASE

The record will reflect that the Court found that the sum of 10% of the amount due would be an unreasonable sum to be allowed The Bank of Tucson as attorneys' fees in this case (Finding #25).

The only evidence offered by The Bank of Tucson upon the question of attorneys' fees was the Note itself. It contained a provision

that in the event the note was placed in the hands of an attorney for collection, the maker shall, in addition to all other sums found due thereunder, pay as attorneys' fees a sum equal to 10% of the amount found to be due.

ARGUMENT ON THE QUESTION PRESENTED

The general rule is quite clear that a stipulation as to an allowance of attorneys' fees on a promissory note is valid. However, to entitle one to recover attorneys' fees in a litigated matter he must tender evidence upon two propositions. First, that the party has in truth and in fact agreed to pay his counsel a fixed or reasonable sum for his services and second, the reasonableness of the fee. *Porter v. Title Guaranty & Surety Co.* (1909) 170 Idaho 364, 106 P. 299; *Lee v. Howard Broadcasting Corp.* (1957) Tex. Civ. App. 305 S.W. 2d 629. To justify the Court, then, in allowing attorneys' fees upon the basis of a provision in a note, the party claiming the fees must also prove that he has agreed to pay his counsel a stipulated or a reasonable fee for his services, and the reasonableness of the fee agreed upon, or what is a reasonable fee in such a matter. Upon this evidence being submitted to the Court it is then able to find the amount to be allowed in such a proceeding, but without such evidence there is nothing upon which the Court could base a finding allowing such a fee. In the present case there being no evidence that the Bank of Tucson has agreed to pay its counsel a fixed or a reasonable fee in this matter and there being no evidence as to what would be a reasonable fee for services rendered in such action the Court could do nothing but deny attorneys' fees to anyone.

The present case is stronger than the general rule for the facts are quite clear that it was this Answering Appellant that had to sue to have a determination relating to whose funds these were. It wasn't the Bank of Tucson.

What the Bank of Tucson argues is that the Appellant is to proceed and prove that their fee is unreasonable when the Appellant doesn't even know the amount or for that matter whether this particular litigation is covered by a monthly or yearly retainer, that Appellant should put on expert testimony as to what the fee for this trial should be when there would be nothing available to the Appellant to propose the question as to time spent, the talent employed on the case, the amount of legal research conducted, the intricacies of the questions that came up during the preparation of the case and the amount of preparation actually accomplished. These are all matters peculiarly within the control of The Bank of Tucson and not this Answering Appellant.

Therefore the finding of the Court in relation to the question was proper.

Lawrence Ollason

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Lawrence Ollason